FEDERAL TAXATION OF JUDICIAL COMPENSATION.—On June first of this year, the United States Supreme Court settled a long source of bitter disagreement; namely, whether the judiciary of this government could be subjected to Congressional taxation under the income tax enactments.

A provision of the 1919 measure required the computation of income profits to embrace all gains, profits and the like, "including in the case of the President of the United States, the judges of the Supreme and inferior courts * * * the compensation received as such".[1] Taxes collected in pursuance of this act had been protested and were suspended subject to the case of *Evans* v. *Gore*,[2] decided in June after a long debate.

It has ever been a strong contention that the judiciary, as the weakest of the three divisions of government, is entitled to jealous protection from mistreatment by the legislative or executive departments. The third Article, Section one, of the Federal Constitution states that "the judges, both of the Supreme and inferior courts * * * shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office." There is a similar limitation as to the President.[3]

The particular need for making the judiciary independent was pointed out clearly by Alexander Hamilton in the following: "It (the judiciary) may truly be said to have neither force nor will, but merely judgment. * * * The complete independence of the courts of justice is peculiarly essential in a limited constitution. * * * Limitations of this kind can be preserved in practice no other way than through the mediums of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void."[4]

Somewhat later John Marshall, while Chief Justice, tersely said: "Is it not to the last degree important that he (the judge) should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience?"[5]

President Wilson has thus expressed the matter: "It is also necessary that there should be a judiciary endowed with substantial and independent powers and secure against all corrupting or perverting influences; secure, also, against the arbitrary authority of the administrative heads of the government."[6]

The primary way to secure independence was to make the judiciary financially independent, for, as Mr. Hamilton said: "In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*"[7]

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[1] Comp. Stat. Ann. Supp., 1919, § 6336⅛ ff.
[2] 40 Sup. Ct. 550.
[3] U. S. Const. Art. 2, § 1, Cl. 6.
[4] THE FEDERALIST, No. 78.
[5] Debates Va. Conv. 1829-1831, pp. 616, 619.
[6] WILSON, CONSTITUTIONAL GOVERNMENT IN THE U. S., pp. 17, 142.
[7] THE FEDERALIST, No. 79.

Judge Story added: "Without this provision (as to an undiminishable compensation) the other, as to the tenure of office, would have been utterly nugatory, and indeed a mere mockery." [8]

Diminution may be effected in many ways, either directly or indirectly. Taxing the judiciary is rather like paying with one hand, and immediately withdrawing with the other, for, of course, the compensation is thus substantially diminished. While the power to tax is a broad one, some few exceptions to its exercise have always existed. Congress cannot impose an income tax on salaries of State officers.[9] Neither can it tax income from the interest on State bonds.[10] This exception as to federal judges should be included, reasoned the court, since otherwise an avenue would be left open which would sooner or later defeat the prohibition in Article three of the Constitution. The old doctrine of "resist the beginnings" should be applied.

No attempt had been made prior to 1862 to tax the compensation of federal judges. A statute, passed that year,[11] placed an income tax of three per cent on all civil officers of the United States. This was enforced for seven years until Attorney General Hoar declared that the President and the federal judges must be exempted.[12] In the Income Tax Act of 1894,[13] nothing was said as to taxing the compensation of judges. The acts of 1913, 1916 and 1917.[14] all purposely excepted from the tax levied the salaries of the judges then in office, and also that of the President for the then current term. Thus in one hundred and twenty years there had been only one attempt to tax the judiciary by a federal enactment. In Pennsylvania, Louisiana and North Carolina there exist similar rulings as to judges [15] and in each State the constitutional prohibition resembles that of Article three in the federal instrument.

Considerable difficulty has arisen over the phrasing of the Sixteenth Amendment. Authorities have been in doubt since 1913 as to the construction of its broad wording. It provides as follows: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

Just what was meant to be inferred by the phrase "from whatever source derived" is puzzling. Speaking broadly, that could

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[8] 2 STORY, CONST., 5th ed., § 1628.
[9] Collector *v.* Day, 11 Wall. 113.
[10] Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429, 585, 601, 652, 653.
[11] 12 Stat. 472, c. 119, § 86.
[12] 13 Op. A. G. 161.
[13] 28 Stat. 509, c. 349, § 27 *et seq.*
[14] 38 Stat. 168, c. 16; 39 Stat. 758, c. 463, § 4 (Comp. Stat. § 6336d); 40 Stat. 329, c. 63 (Comp. Stat. Ann. Supp., 1919, § 6336d).
[15] Commonwealth *v.* Mann, 5 Watts & S. (Pa.) 403; New Orleans *v.* Lea, 14 La. Ann. 197; Purnell *v.* Page, 133 N. C. 125, 45 S. E. 534.

include the salaries under question, and certainly taxes levied by the acts of 1919,[16] which the court declared unconstitutional in June. Mr. Justice Van Devanter, in the opinion in this case, states that the purpose of the Sixteenth Amendment was not to render that taxable which had always been exempted but that it was passed merely to do away with apportionment—a change in no wise affecting the power to tax, but only the mode and machinery of exercising that power. The debates in Congress [17] and the public appeals made at the time of the ratification of the Amendment [18] show that the intention to do away with the apportionment was uppermost in the minds of the members of Congress who framed the act. This view and construction was also held in an earlier case in the Supreme Court.[19] After summing up the arguments on this question in an able opinion, a majority of the justices reached the conclusion that any income tax imposed on federal judges was, despite the Sixteenth Amendment, contrary to Article three of the Constitution, and hence void.

Mr. Justice Holmes and Mr. Justice Brandeis entered a strong and spirited dissenting opinion.[20] These gentlemen are of the firm conviction that the tax would have been valid even under the original Constitution, and that if not, it was certainly made lawful by the passage of the Sixteenth Amendment. They do not stretch the cloak of protection of our judges to the extent of making them immune from taxation. As Justice Holmes says: "That (Constitution, Article three) is a very good reason for preventing attempts to deal with a judge's salary as such, but seems to me no reason for exonerating him from the ordinary duties of a citizen, which he shares with all others. To require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge. I see nothing in the purpose of this clause (Art. 3) of the Constitution to indicate that the judges were to be a privileged class * * *."

It would appear that at some point or other the immunity must cease. If a house were purchased with the judicial salary, surely such house could be taxed as a portion of the judge's assets; then why not the income, immediately before conversion? Justice Holmes continues: "I think that the moment the salary is received, whether kept distinct or not, it becomes part of the general income of the

[16] *Supra.*

[17] 44 Cong. Rec. 1568-1570, 3377, 3900, 4067, 4105-4107, 4108-4121, 4389-4441.

[18] 45 Cong. Rec. 1694-1699, 2245-2247, 2539, 2540.

[19] Brushaber *v.* Union Pacific R. Co., 240 U. S. 1, 17, 18, where the Chief Justice stated: "The whole purpose of the amendment was to relieve all income taxes when imposed from apportionment." Reaffirmed in Eisner *v.* Macomber, 40 Sup. Ct. 189, decided at the same term as Evans *v.* Gore, *supra.*

[20] Evans *v.* Gore, *supra.*

owner, and is mingled with the rest, in the theory of law, as an item in the mutual account with the United States."

Not so many years ago similar decisions were reached in the Supreme Court itself. In *Peck & Co.* v. *Lowe*,[21] a tax was levied on income, two thirds of which was directly derived from exports, and the Constitution expressly prohibits any tax on articles exported from any State.[22] In *United States Glue Co.* v. *Oak Creek*,[23] the same principle was upheld as to interstate commerce profits; and this was done in spite of a direct prohibition in the Constitution, while there is no such express provision to be found prohibiting the *taxation* of judges. The Sixteenth Amendment was passed to do away entirely with the necessity of laboriously searching into the source of incomes, and the apportionment of a direct tax. No exception was included in the Amendment; yet the Supreme Court almost immediately proceeds to read these exceptions and exemptions into the plain phrasing. Evidently "from whatever source derived" does not mean what the words would convey to an average student of construction.

The argument that an ordinary tax, borne by every citizen, is likely to endanger the existence of the judiciary is rather a weak one. If any additional burdens should subsequently be placed upon this branch, it would be a very simple thing for the Supreme Court to declare such an imposition void and of no effect. This court is truly "supreme", and no department of our government has any appeal from its judgments. It should be able amply to protect its own welfare and interests.

W. J. B.

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[21] 247 U. S. 165.
[22] Art. 1, § 9, Cl. 5.
[23] 247 U. S. 321, 329.